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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COUNTY OF LOS ANGELES, Plaintiff and Appellant, v. SENECA INSURANCE COMPANY, Defendant and Respondent.	B234625 (Los Angeles County Super. Ct. No. SJ003596)

APPEAL from an order of the Superior Court of Los Angeles County. Karla Kerlin, Judge. Affirmed.

E. Alan Nunez for Plaintiff and Appellant.

Ruben Baeza, Jr., Assistant County Counsel, Takin Khorram and Jenny Tam, Deputy County Counsel, for Plaintiff and Respondent.

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Seneca Insurance Company (Surety) appeals the trial court's denial of its motion to discharge a bail bond forfeiture, set aside the summary judgment, and exonerate bail. Finding no error, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

On November 11, 2009, Surety, through its bail agent King Bail Bond Agency, posted its bond in the amount of $35,000 for the release of Michael Allen Monette (the defendant), who was in custody on a charge of violating Penal Code[1] section 12021, subdivision (a), possession of a firearm by a felon. The amount of the bail was determined by reference to the bail schedule for the County of Los Angeles which, pursuant to section 1269b, subdivision (c),[2] was adopted by the judges of the Los Angeles Superior Court.

The next day, the Los Angeles County District Attorney filed a complaint charging the defendant with a violation of section 12021, subdivision (a)(1), and alleging that he was subject to the "Three Strikes" law pursuant to section 1170.12, subdivisions (a) through (d) and 667, subdivision (b) through (i), based on a prior robbery conviction. Section 1269b, subdivision (e) provides for additional bail in these circumstances: ". . . In considering the seriousness of the offense charged the judges shall assign an additional amount of required bail for each aggravating or enhancing factor chargeable in the complaint . . . ." The complaint contained the district attorney's recommendation that bail be set at $85,000; however, no change in bail was requested of or ordered by the court.

The defendant appeared in court on May 25, 2010 for a *Pitchess* motion, and was ordered to return on June 14, 2010. On June 8, 2010, he was arrested in Orange County,

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[1] Unless otherwise noted, statutory references are to the Penal Code.

[2] That section provides: "It is the duty of the superior court judges in each county to prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses . . . ." (§ 1269b, subd. (c).)

where he remained in custody throughout the proceedings in this matter. Consequently, he failed to appear as ordered on June 14, 2010, and the bail was declared forfeited on that date. A notice of the forfeiture was mailed to Surety and its bail agent on June 15, 2010.

On September 29, 2010, the bail agent, Teri King, discovered that the defendant was in custody in Orange County; she notified Los Angeles County warrants department of his location; Los Angeles County placed a hold on the defendant in the underlying case.

Ms. King explained that she did not immediately seek to vacate the forfeiture and exonerate the bond pursuant to section 1305, subdivision (b) and (c)(3) because, in her experience, "defendants are generally transported back to custody within a short period of the hold being placed in outlying counties" and she "was confident that the defendant would be returned to custody in Los Angeles before the forfeiture period expired." However, on December 8, 2010, ten days before that period was to expire, the bail agent learned that her elderly uncle was diagnosed with late stage cancer, and she spent the next several weeks caring for her family. As Ms. King explained, "Because of this family crisis I did not follow up with Los Angeles County to confirm that the defendant had been returned to custody on the underlying case."

Summary judgment was entered on the forfeiture on January 24, 2011. On March 23, 2011, Surety filed a motion to discharge the forfeiture and set aside the judgment. It argued that the bail contract was rendered void when the district attorney filed charges which increased Surety's risk on the bond, and that, pursuant to Code of Civil Procedure section 473, the court should set aside the summary judgment and exonerate bail based on the bail agent's mistake and excusable neglect in failing to timely move the court for relief under section 1305, subdivision (c)(3). The trial court denied the motion, from which Surety timely appealed.

CONTENTIONS

As it did in the court below, Surety advances two arguments in support of its claim for relief from forfeiture: It contends that the inclusion of special allegations in the complaint, which resulted in a higher scheduled bail amount, increased Surety's risk and rendered the bail contract void. Surety also maintains that it was entitled to exoneration of its bond because the defendant was timely arrested in the underlying case. We consider each contention below.

DISCUSSION

1. *Addition of prior conviction allegations*

Surety claims that the complaint, with its enhanced charges of prior convictions, substantially increased the risk that the defendant would not appear as ordered, and thus invalidated the bail bond. The argument is unavailing.

Surety's bail bond, dated November 11, 2009, states: "Now, the Seneca Insurance Company, Inc. hereby undertakes that the above-named defendant will appear in the above-named court on the date above set forth to answer any change in any accusatory pleading based upon the acts supporting the complaint filed against him/her and as duly authorized amendments thereof, in whatever court it may be prosecuted, and will at all times hold him/herself amenable to the orders and process of the court, and if convicted, will appear for pronouncement of judgment or grant of probation; or if he/she fails to perform either of these conditions that the Seneca Insurance Company, Inc. will pay to the people of the State of California, the sum of Thirty-Five Thousand Dollars ($35,000.00)."

Thus, Surety agreed to produce the defendant "to answer any charge in any accusatory pleading based upon the acts supporting the complaint filed against him/her and all duly authorized amendments." Surety does not maintain that the enhancement allegations were not based upon the acts for which the defendant was being held in custody, or that they were not duly authorized within the meaning of the bond. Thus, it

would appear that, to the extent that Surety's risks increased by reason of the enhancements, it agreed to assume these increased risks when it issued the bond.

People v. International Fidelity Insurance Company (2010) 185 Cal.App.4th 1391 (*International Fidelity*) supports this conclusion. In that case, the criminal defendant, Daniel Rojas, was charged in a felony complaint with attempted murder, second degree robbery and aggravated assault against a named victim. Sentencing enhancements for personal use of a deadly weapon (a knife) and infliction of great bodily injury were alleged. After Rojas had been released on bail, the district attorney filed two amended felony complaints and an original and an amended information. Pursuant to all of the charging documents, Rojas was held to answer on the following charges in addition to those appearing in the original complaint: a second charge of second degree robbery against a second victim, with the allegation that Rojas used a deadly weapon; a third count of second degree robbery against a third victim, with an allegation that Rojas personally used a deadly weapon, a knife; and two counts of attempted premeditated murder of the first victim, again with an allegation of personal use of a deadly weapon. The surety was not notified of the amendments to the complaint and the information. (*Id*. at pp. 1393-1394.) Although the district attorney moved to increase bail at the time the first amended information was filed, the motion was denied. Both the surety and the county agreed that "the total potential sentence faced by Rojas increased substantially" (*id*. at p. 1396, fn. 2) due to the amendments filed following Rojas's release on bail. The surety argued that this substantially greater penalty so increased Rojas's risk of flight that the terms of the bond were materially altered.

The Court of Appeal rejected the contention. After noting that the language of the bond guaranteed Rojas's appearance on any charge in an amended pleading so long as the charge was based on the same acts supporting the original complaint,[3] the court concluded: "If [the surety] entered into the contract – the bond – believing it would be

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[3] The relevant language of the bond in *International Fidelity* is identical to that in the bond issued by Surety in this case.

exonerated if Rojas's flight risk increased due only to an increase in the charges pending against him, that was a belief based on [its] subjective intent, and is not relevant to the issue of interpretation of the bond. There is nothing in the bond or in any statute referring to increased flight risk as a term of the bond. The contracting parties made their deal, and we will enforce it." (185 Cal.App.4th at p. 1397; see also *People v. Bankers Insurance Company* (2010) 181 Cal.App.4th 1, 5-7.)

As in *International Fidelity, supra*, the defendant here was ultimately held to answer to charges based on the same acts on which he was in custody when Surety issued the bond. Pursuant to the unambiguous language of the bond, Surety agreed to produce the defendant to "answer any charge in any accusatory pleading based upon the acts supporting the complaint filed against him/her and all duly authorized amendments." Surety has presented no basis to exonerate bail based on a supposed increased flight risk.

2. *Timeliness of motion for relief from forfeiture*

Surety next argues that, despite recent Supreme Court authority to the contrary, the trial court erred in failing to vacate the forfeiture and exonerate the bond because the defendant was in custody in another county, and would eventually be returned to Los Angeles County and the court's jurisdiction. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 requires that we reject this contention.

Section 1305, subdivisions (c)(1) and (c)(2) expressly mandate that a trial court, *on its own motion*, must vacate a bail bond forfeiture if, within 180 days of the forfeiture order (commonly known as the appearance period), the defendant appears, either voluntarily or in custody after surrender or arrest, in the court which ordered the forfeiture, or is surrendered to custody or arrested in the county in which the underlying case is pending. A different provision, section 1305, subdivision (c)(3), applies to the circumstance before us: "If, outside the county where the case is located, the defendant is surrendered to custody by the bail or is arrested in the underlying case within the 180-day period, the court shall vacate the forfeiture and exonerate the bail." As the court noted in *People v. Ranger Ins. Co.* (2006) 141 Cal.App.4th 867, 870, "Unlike section 1305

subdivision (c)(1) and (c)(2), subdivision (c)(3) contains neither the requirement that the court act on its own motion, nor language of automatic exoneration." Thus, the surety must move the court for the requested relief in order to set aside the forfeiture and have the bond exonerated. (*People v. Lexington National Ins. Co.* (2007) 158 Cal.App.4th 370, 373, and cases cited therein.) There was a split of authority among the Courts of Appeal, however, regarding whether such a motion must be brought within the 180-day appearance period: the Second District Court of Appeal said no, in *People v. Ranger, supra,* at page 871; the Third District Court of Appeal said yes, in *People v. Lexington, supra,* at page 375.

Our Supreme Court settled the disagreement in *People v. Indiana Lumbermens Mutual Insurance Company* (2010) 49 Cal.4th 301. There, in circumstances directly analogous in all material respects to those of the case before us, the court concluded: "The surety's contractual obligation on its bond is the same whether the defendant eventually returns to custody in the county where bail was granted or elsewhere. The statutory 180-day period is also the same, and the Legislature has reasonably required that when the defendant is returned to custody outside the county, it is incumbent on the surety to bring a motion for relief from forfeiture. The deadlines and procedures for seeking relief have been tailored to accommodate the interests of the surety, which appropriately bears the burden of compliance with the statutory requirements." (*Id*. at p. 313.) Like the surety in *People v. Indiana Lumbermens Mutual Insurance Company, supra,* the bail agent in this case had an adequate opportunity (from September 29 to December 7, 2010) to file a motion for relief from forfeiture during the appearance period, notwithstanding that she was unable to file the motion during the last ten days (December 8 to 17) of that period.

DISPOSITION

The order is affirmed.

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ARMSTONG, J.

We concur:

TURNER, P. J.

MOSK, J.